93-900

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DANIEL M. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court should resolve the "confusion" that it has previously acknowledged, *United States v. Zolin*, 491 U.S. 554, 563 n. 7 (1989), as well as a direct conflict among the Circuits, regarding the showing needed to overcome the attorney-client privilege based upon an allegation of "crime or fraud."

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PETITION FOR WRIT OF CERTIORARI

Daniel M. Davis respectfully petitions this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Davis*, 1 F.3d 606 (7th Cir. 1993). In *Davis*, the court, applying a minimal burden of proof, contrary to past decisions of this Court and other Courts of Appeal, held that the prosecution had made a showing of a "crime or fraud" sufficient to overcome Davis' attorney-client privilege. As a consequence, it allowed the prosecution to question Davis' former attorney about attorney-client communications.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 1 F.3d 606. A copy of the reported opinion is attached as part of the Appendix to this Petition. (App. 1) Also included in the Appendix are copies of three rulings by the United States District Court for the Northern District of Illinois relating to the points raised in this Petition. (App. 13, 28, 34)

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 5, 1993. (App. 11) On August 19, 1993 petitioner filed a timely petition for rehearing, with a suggestion of rehearing *en banc*. The court denied the petition for rehearing on October 12, 1993. (App. 12) This Court has jurisdiction to review the decision of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE[1]

A. Procedural Background

Davis was charged in a one-count indictment alleging obstruction of justice under 18 U.S.C. §1503. The jurisdiction of the district court was invoked under 18 U.S.C. §3231.

[1] Citations to the record before the Court of Appeals are designated as "R. ____."

Prior to trial, the prosecution served a trial subpoena upon attorney Matthias Lydon, who had represented Davis during the grand jury investigation that preceded the indictment. The prosecution informed the trial court that it intended to question Lydon about attorney-client communications he had had with Davis. It contended that Davis' attorney-client privilege was "waived" due to Davis' commission of a crime or fraud. The claimed crime or fraud involved Davis' alleged failure to produce in timely fashion a document that the prosecution contended was called for by a grand jury subpoena *duces tecum* served in January 1990.

Davis filed a pretrial motion *in limine* to bar the proposed questioning. He argued that the document was not within the scope of the subpoena and thus that his failure to produce it in January 1990 did not establish a "crime or fraud." Davis also pointed out (and it was undisputed) that he had voluntarily produced the document a few months later, in the course of cooperating with prosecutors. He argued that allowing the prosecution to question Lydon would violate his attorney-client privilege.

After considering evidentiary submissions, the district court denied Davis' motion *in limine*, ruling that although there was no "obvious" wrongdoing, the prosecution had shown a "prima facie case" of a crime or fraud, thus enabling it to question Lydon. (App. 13)

Davis filed a notice of appeal.[2] On appeal, the Seventh Circuit stated that Davis "might be right" that the docu-

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[2] The appeal was taken prior to trial. Although the prosecution did not question appellate jurisdiction, the Seventh Circuit addressed the issue *sua sponte*. The court held that it had jurisdiction, stating that "clients are entitled to appeal as soon as their

(Footnote continued on following page)

ment was not subject to the subpoena, but it nonetheless affirmed the district court's ruling on the grounds that it was "plausible" that the document "could have" fallen within the subpoena's scope. (App. 8-9) In short, the Seventh Circuit held that Davis lost his attorney-client privilege simply because it was *conceivable* that the document *might have been* called for by a subpoena.

B. Facts

On January 3, 1990, a grand jury subpoena directing Special Operations Associates, Inc. (SOA) to produce certain corporate records was served upon Davis, in his capacity as a corporate officer. (R. 37, Ex. 1 ¶2) In pertinent part, the subpoena called for the production of the following SOA corporate records:

> For the period from January 1986 to the present, any and all ORIGINAL records and ORIGINAL received correspondence, and copies of any and all outgoing correspondence, involving business and/or financial transactions between Special Operations Associates and any of the following persons or entities: Audrey Tokarz, Home Incarceration Systems, Inc. . . . .

(R. 37, Ex. 3 (capitalization in original)) On January 12, 1990, attorney Matthias Lydon, who had been retained to represent SOA, Davis, and corporate officer Michael

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[2] *continued*
attorneys are required, in the face of an assertion of attorney-client privilege, to testify or produce documents." (App. 3) The court relied upon *Perlman v. United States*, 247 U.S. 7 (1918); *United States v. Calandra*, 706 F.2d 225 (7th Cir. 1983); *In the Matter of Klein*, 776 F.2d 628 (7th Cir. 1985); *In re November 1979 Grand Jury*, 616 F.2d 1021, 1024-25 (7th Cir. 1980); and *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671, 674 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

Caccitolo, sent the prosecutor the documents along with a letter stating that "all original documents which respond to the subpoena to Special Operations Associates, Inc." were being sent. (R. 37, Ex. 7)

The prosecution claims that the documents produced by SOA in January 1990 should have included a copy of an unexecuted draft agreement among Davis, Caccitolo, and Audrey Tokarz. (R. 1 ¶4) The document is reproduced in the Appendix to this Petition. (App. 40) Davis in fact turned over a copy of the document to attorney Lydon in late May, 1990 in the course of cooperating with the prosecution's investigation. Lydon provided it to the prosecutor around six weeks later. (R. 40, Appdx. C)

The prosecution claimed, however, that the document was within the scope of the subpoena to SOA and that Davis' failure to produce it pursuant to the subpoena served as a basis to pierce his attorney-client privilege with Lydon.[3] Davis maintained that the document was his personal record, thus not covered by a subpoena to SOA for corporate documents, and that in any event it was not within the specifications in the subpoena to SOA. Because he was under no obligation to produce the record, Davis argued, the non-production did not give rise to an inference of wrongdoing.

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[3] The prosecution also suggested that the document also should have been produced in response to another, later subpoena addressed to Davis personally. Davis disputed this. The district court did not address the issue. On appeal, the Seventh Circuit stated that because it was reviewing the district court's decision for abuse of discretion, "we will limit our discussion to matters addressed by the district court" and thus would not address the second subpoena. (App. 8 n.7)

The evidence before the district court supported Davis' contentions. The proposed agreement did not even mention SOA; the company was not a party to the transaction it contemplated. (App. 40) And the agreement had never been concluded: in 1988, long before the grand jury investigation began, Davis decided against the proposal and destroyed the original (which some of the parties had already signed), retaining only an unsigned photocopy. (R. 37, Ex. 15; R. 83 at 55-57) He kept this photocopy in a file folder of his personal records kept at SOA. (R. 83 at 55-57) Based upon this uncontradicted evidence, Davis argued that the subpoena to SOA did not call for the document, for several reasons: it was his personal record, not an SOA corporate document; it did not "involv[e] business and/or financial transactions between Special Operations Associates" and others (as called for by the subpoena), but instead was among individuals; it did not involve a "transaction" at all, for the parties had not concluded the deal; and it was not an "original."

C. The District Court's Ruling

The district court held that the SOA corporate-records subpoena "could require" production of Davis' unexecuted photocopy of the draft agreement. (App. 20) However, the court did not address Davis' claim that the document was his personal record, not SOA's, and thus was not subject to the subpoena. The court also did not address Davis' contention that the document fell outside the subpoena's specifications because it did not involve a "transaction between Special Operations Associates and [others]," but rather a proposed deal among individuals. In fact, the court ignored this limitation in the subpoena, considering only whether the document could be deemed "original correspondence" or an "original record." (App. 20) The court

reached the startling conclusion that the subpoena "could be read to include all documents relating to SOA," thereby expanding the subpoena dramatically to include each and every business record of the corporation. (App. 20) It concluded that the document, which did not even mention SOA, could be deemed to "relate to SOA." (App. 20)

Even though it had disregarded Davis' primary arguments, the district court still conceded that the nonproduction of the document did not present an "obvious" crime or fraud. (App. 25) Nonetheless, it ruled that the prosecution had established a prima facie case that Davis had used Lydon to further an ongoing fraud. (App. 25-26) The court purportedly applied the standard set forth in *Matter of Feldberg*, 862 F.2d 622 (7th Cir. 1988) (App. 18-19, 26), which held that a "prima facie case" in this context does not require "evidence sufficient to support a verdict" but rather merely "evidence which calls for further inquiry."

In his motion *in limine*, Davis had argued that the unexecuted photocopy that he had retained was not an "original" and thus was not producible under a subpoena that clearly and emphatically called only for "*ORIGINALS.*" In its decision, the district court had nonetheless *assumed* the document was an original, inviting Davis to seek reconsideration if he disagreed. (App. 20 n. 4) Davis filed a motion to reconsider, presenting essentially the same points that he had previously presented (but which the court had ignored) on that topic. Specifically, the evidence demonstrated that the document that Davis retained was a photocopy, the original having been destroyed much earlier, before the grand jury investigation; the prosecution did not claim otherwise. The court, relying on evidence that the photocopy had been made shortly after the original was prepared, ruled that an "original copy" of a document "can qualify as an original." (App. 32)

D. The Seventh Circuit's Decision

On appeal, Davis argued that the standard for applying the crime-fraud exception should be stiffer than that set forth in *Matter of Feldberg* and that even under *Feldberg*, the government had not presented a prima facie showing of a crime or fraud.

The Seventh Circuit declined Davis' request that it re-examine the standard for evaluating a "prima facie case" of crime or fraud that it had declared in *Feldberg*. (App. 7 n. 6)

As to whether the prosecution had shown a prima facie case, the court conceded that "Davis might be right" that the document was not subject to the subpoena to SOA. (App. 8) It nonetheless concluded that the district court's ruling was not an abuse of discretion, stating that the district court's holding that the document "could have" fallen within the scope of the subpoena was "plausible" and did not "defy reason." (App. 9) This, the court believed, was enough to make out a "prima facie case."

Specifically, the court stated that "if the document was sent to Davis or Caccitolo in their official capacities," the district court's conclusion that it might be considered "original correspondence" was "plausible." (App. 8-9) In this regard, the panel ignored uncontradicted evidence, submitted by the government itself, showing that the document was *not* "sent to Davis or Caccitolo." An SOA administrative aide, whose testimony the court cited on another topic (*see* App. 9, citing Govt. [7th Cir.] Appdx. 62), testified, *at the very same cited page*, that after typing the draft agreement she simply handed it to Davis. (*See* Govt. [7th Cir.] Appdx. 62) There was no "correspondence."

The court further stated that the district court's belief that the subpoena's demand for "original records" could

reach "all documents relating to SOA" was "quite reasonabl[e]," and that "it does not defy reason to conclude that the document in question was somehow related to SOA." (App. 9) As noted, however, the subpoena did not simply call for "original records" but rather for "original records . . . *involving business and/or financial transactions between Special Operations Associates and any of the following persons or entities*: Audrey Tokarz; Home Incarceration Systems . . . ." (R. 37, Ex. 3 (emphasis added)) The court ignored this specific limitation upon the scope of the subpoena: quite simply (and quite obviously), the subpoena did not call for "all documents related to SOA."

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD RESOLVE THE "CONFUSION" THAT IT RECENTLY ACKNOWLEDGED REGARDING THE QUANTUM OF PROOF NEEDED TO OVERCOME THE ATTORNEY-CLIENT PRIVILEGE BASED UPON A "CRIME OR FRAUD".

It is well settled that the attorney-client privilege does not extend to communications made for the purpose of getting advice for the commission of a crime or fraud. *Clark v. United States*, 289 U.S. 1, 15 (1933). By contrast, the quantum of evidence needed to establish such a "crime or fraud" is anything but settled. The Court recently acknowledged that there is "confusion" among the lower courts regarding the showing needed to overcome the privilege on such grounds. *United States v. Zolin*, 491 U.S. 554, 563 n. 7 (1989). Indeed, there is a direct con-

flict among the Circuits on this point. The Court should grant certiorari to resolve this acknowledged confusion.

Sixty years ago, the Court declared that unsupported allegations of wrongdoing are insufficient to overcome the attorney-client privilege. " 'It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.' " *Clark*, 289 U.S. at 15 (quoting *O'Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.)). Rather, the party seeking to overcome the privilege must produce "prima facie evidence that [the charge] has some foundation in fact." *Id.*

The "prima facie evidence" standard, however, "has caused some confusion"; "[t]he quantum of proof needed to establish admissibility was then, and remains, subject to question." *Zolin*, 491 U.S. at 563 n. 7. Three Circuits follow a "directed verdict" standard: "While a prima facie showing need not be such as to actually prove the disputed fact, it must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted." *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 53 (M.D.N.C. 1987); *accord, In re International Systems & Controls Corp. Securities Litigation (Koenig v. International Systems & Controls Corp.)*, 693 F.2d 1235, 1242-43 (5th Cir. 1982) (party seeking to overcome privilege must produce evidence sufficient to support a verdict in its favor, and must provide "some proof of specific intent" by the client to commit a crime or fraud). *See also In re Sealed Case*, 754 F.2d 395, 399, 400 (D.C. Cir. 1985) (requiring "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud").

At least one Circuit requires more. In the Eighth Circuit, "ambiguous or controverted" evidence is insufficient to establish a prima facie case of a crime or fraud, *In re Murphy*, 560 F.2d 326, 338 (8th Cir. 1977), and evidence that previously had been found insufficient to convict under the standard of "beyond a reasonable doubt" was *ipso facto* deemed insufficient to meet the "prima facie case" standard. *Id.* at 338-39. Where the alleged crime or fraud involves non-production of documents, the Eighth Circuit, as well as the Fifth, requires a specific showing of intent—a *knowing* failure to produce. *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 207 (8th Cir. 1985) and *id.* at 208 (Fagg, J., dissenting); *see also International Systems & Controls*, 693 F.2d at 1242-43.

Other Circuits, rejecting the "directed verdict" approach, follow a "probable cause" standard: if the opponent of the privilege can show that a prudent person would have a reasonable basis to *suspect* the perpetration or attempted perpetration of a crime or fraud, and that the attorney-client communications furthered the fraud, the privilege disappears.[4] *In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co. v. United States)*, 731 F.2d 1032, 1039 (2d Cir. 1984); *accord*, *In re Antitrust Grand Jury (Advance Publications, Inc. v. United States)*, 805 F.2d 155, 166 (6th Cir. 1986).

Some Circuits, including the Seventh, follow none of these standards but instead have set their own, lower thresholds. In *Matter of Feldberg*, 862 F.2d 622 (7th Cir. 1988), the Seventh Circuit specifically rejected the "directed verdict" standard, stating that the standard "is not whether the evidence supports a verdict but whether it calls for inquiry." *Id.* at 625-26. The Eleventh Circuit requires even less: the claim of crime or fraud "must have some foundation in fact," which (at least in the grand jury

context) can be shown "by a good faith statement by the prosecutor as to what evidence is before the grand jury." *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987).

In addition to this plethora of competing standards, there is even confusion as to which standard poses a heavier burden. According to the Sixth Circuit, the "directed verdict" standard "is generally *less* than what we believe is needed for the government to meet its burden [of showing a crime or fraud]." *In re Antitrust Grand Jury*, 805 F.2d at 166. That court believes that the "probable cause" standard establishes a higher threshold than the "directed verdict" standard. *Id.* at 165. The Seventh Circuit, however, appears to believe just the opposite, namely that the "directed verdict" standard is more exacting; it rejected that standard as setting too high a threshold. *See Feldberg*, 862 F.2d at 625-26 (discussing the "enough evidence to support a verdict" standard).

The time is ripe for this Court to resolve this confusion. While the Court did not address the burden of proof issue in *Zolin*, *see* 491 U.S. at 563 & n. 7, it strongly signaled that the burden must be higher than the "probable cause" standard used by some Circuits. In *Zolin*, the issue was when a court may make an *in camera* review of privileged materials as a tool in determining whether a crime or fraud has been shown. The Court established a probable cause standard, but stated that this was "a lesser evidentiary showing . . . than is required ultimately to overcome the privilege." *Id.* at 572. *Zolin* thus suggests that many of the Courts of Appeal, including the Seventh Circuit, are applying too low a burden of proof in considering crime-fraud claims.

The present case presents an appropriate opportunity for the Court to address the burden of proof issue. We submit that the showing deemed sufficient by the Seventh Circuit would not have satisfied more exacting standards established in other Circuits. For example, the Eighth Circuit refused to declare the privilege forfeit even though it was shown that counsel had failed to produce documents that were *clearly* subject to a subpoena. *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d at 205-07. By contrast, the Seventh Circuit has allowed the government to pry into Davis' communications with criminal defense counsel only because it found "plausible" the district court's broad *expansion* of the SOA subpoena and its ruling that the document "could have" fallen within that expanded scope. The court itself conceded that "Davis might be right" that he was under no obligation to produce the document; yet absent such an obligation, the non-production was immaterial, and there was no "crime or fraud." *Cf., e.g., Sevako v. Anchor Motor Freight, Inc.*, 792 F.2d 570, 575 (6th Cir. 1986) (fact that defendant did not voluntarily give plaintiff documents without a request was not "concealment"); *Curry v. A.H. Robins Co.*, 775 F.2d 212, 218 (7th Cir. 1985) (defendant's silence is not "concealment" of cause of action absent duty to speak).

The Seventh Circuit required no more than a mere scintilla of evidence of a crime or fraud. This is a lower threshold than the "probable cause" standard that *Zolin* indicates is too low. The Court should grant certiorari in order to put an end to the disarray that currently exists among the Circuits in analyzing crime-fraud claims.

II.

THERE IS A CLEAR NEED FOR THIS COURT TO ESTABLISH CLEAR, UNIFORM PROCEDURES FOR ANALYZING CLAIMS OF "CRIME OR FRAUD" IN ORDER TO AVOID UNWARRANTED INTRUSIONS INTO THE ATTORNEY-CLIENT PRIVILEGE.

This Court has recognized that the attorney-client privilege is instrumental in promoting the public interest in the observance of law, which the privilege accomplishes by encouraging full and frank communication between attorneys and clients. *Zolin*, 491 U.S. at 562; *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 406 (1976). The privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), *quoted in Upjohn*, 449 U.S. at 389 and in *Zolin*, 491 U.S. at 562.

Because of the central role the attorney-client privilege plays in the operation of our adversary system of justice, this Court must guard against efforts to render its protections ineffectual. It did so in *Clark*, by declaring that " 'it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.' " *Clark*, 289 U.S. at 15 (quoting *O'Rourke v. Darbyshire*, [1920] A.C. 581, 604 (P.C.)) Yet the Seventh Circuit's "enough to call for inquiry" standard—the judicial equivalent of a raised eyebrow—denigrates the attorney-client privilege, and encourages efforts to pierce through its protections. Because most document production is conducted through counsel, if the Seventh Circuit's ruling stands, any time one party can claim that an unproduced document "might

be" within the scope of a subpoena or document request (be it in civil or criminal litigation), the non-producing party's attorney-client privilege will be deemed waived.

In *Zolin*, this Court began the process of setting forth the standards and procedures by which the lower courts are to consider crime-fraud claims. In doing so, the Court was motivated by the need to protect the privilege against unwarranted intrusions. Making *in camera* review of privileged materials too easy to obtain, the Court stated, "would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. . . . There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions." *Zolin*, 491 U.S. at 571. To avoid this, the Court established a specific threshold that must be met before a district court may review privileged materials *in camera* as a tool for determining the applicability of the crime-fraud exception; it set forth the factors a court should consider in deciding whether to make an *in camera* review once the threshold is met; and it addressed the question of what evidence a court may consider in determining these issues. *Id.* at 572-74.

Zolin underscores the importance that this Court places upon protecting the attorney-client privilege from unwarranted intrusions. It also reemphasizes the fact that the primary means this Court has of accomplishing that task is to establish specific procedures and standards that must be met whenever a party seeks to overcome the privilege. The need for uniformity in this area is manifest. The lack of a clear standard does more than risk disparate results; it results in cases like the present, in which the privilege was deemed waived due to non-production of a document that "could have" fallen within a subpoena only after that subpoena was expanded beyond its intended bounds.

This case presents the Court with an opportunity to complete the task that it began in *Zolin*. The Court should grant certiorari in order to establish a clear, uniform burden of proof for evaluating crime-fraud claims.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Date: December 1, 1993

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-2822 and 92-3153

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL M. DAVIS,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 CR 637—**Ann Claire Williams,** *Judge.*

ARGUED APRIL 6, 1993—DECIDED AUGUST 5, 1993

Before CUDAHY and POSNER, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* A grand jury returned an indictment against Daniel Davis charging him with obstruction of justice in violation of 18 U.S.C. § 1503. Specifically, the indictment alleges that Davis concealed a document during the course of a grand jury investigation. After the grand jury returned the indictment, the government sought and obtained leave from the district court to subpoena, for questioning at trial, Matthias Lydon, an attorney who had represented Davis during the portion of the grand jury's investigation that he allegedly obstructed. After the subpoena was served, Davis filed a motion in limine to

bar the proposed questioning on the theory that the testimony the government intended to elicit called for the divulgence of privileged information. The district court denied Davis's motion, and he appeals.[1]

The case against Davis is still pending in the district court. These appeals are interlocutory and, therefore, present significant questions as to our jurisdiction. The jurisdiction of the courts of appeals in criminal cases is, for the most part, limited to "final decisions of the district courts of the United States." 28 U.S.C. § 1291. The requirement of finality reflects a strong policy against piecemeal review, a policy particularly important in the context of criminal actions where the delays and disruptions of interlocutory appeals are especially troublesome. In fact, it is well settled that, as a general rule, a defendant in a criminal case may not take an appeal from an order denying a motion to suppress evidence. *See, e.g., DiBella v. United States*, 369 U.S. 121, 131 (1962); *United States v. Dorfman*, 690 F.2d 1217, 1222 (7th Cir. 1982). Ordinarily, when the validity of a subpoena is at issue, such as here, the final, appealable decision is an order holding the witness whose appearance is compelled in contempt. *United States v. Ryan*, 402 U.S. 530 (1971).[2]

The parties, however, rely on the judicially created exception to the finality rule first articulated in *Perlman v. United States*, 247 U.S. 7 (1918), which permits the holder of a privilege to intervene in order to assert the privilege and to appeal from the rejection of the assertion.[3] The

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[1] Two appeals have been consolidated in the present case. Number 92-2822 challenges the district court's denial of Davis's initial motion in limine as well as his first motion for reconsideration. Number 92-3153 contests the district court's denial of Davis's objections to certain material the government submitted to supplement the record. The district court construed these objections as yet another motion for reconsideration.

[2] Lydon has not been held in contempt.

[3] Davis's motion in limine is such an intervention.

Court reasoned that because the person called to testify may do so rather than be cited for contempt, the rejection of the claim of privilege is final as a practical matter and thus appealable. On the authority of *Perlman*, we have repeatedly held, albeit with some soul-searching, that clients are entitled to appeal as soon as their attorneys are required, in the face of an assertion of attorney-client privilege, to testify or produce documents. *See, e.g., In the Matter of Klein*, 776 F.2d 628 (7th Cir. 1985); *In re November 1979 Grand Jury*, 616 F.2d 1021, 1024-25 (7th Cir. 1980); *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671, 674 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

The parties have apparently failed to apprehend, however, that *Perlman*, *Klein* and *Velsicol*, the cases cited to us in their jurisdictional statements, all involved pending grand jury proceedings. Because an indictment has already been returned against Davis, the jurisdictional inquiry that we must undertake here is considerably different. In fact, *DiBella v. United States*, 369 U.S. 121 (1962) and *Cogen v. United States*, 278 U.S. 221 (1929) could be read to deny us jurisdiction here, because in those cases the Court refused to apply the *Perlman* exception when the intervening party seeking suppression was a defendant in the underlying criminal case. But neither *DiBella* nor *Cogen* involved assertions of privilege. On the other hand, *United States v. Calandra*, 706 F.2d 225 (7th Cir. 1983), our case most similar to the present one, did. *Calandra* was an appeal from a district court's order denying three criminal defendants' motion to suppress. The motion was based on the defendants' assertion that an attorney-client privilege existed that would bar the testimony of lawyers whom the government intended to call at trial. The appeal was taken while the trial was still in progress. We stated that "[i]t is the possibility of disclosure of information which is thought to be confidential that is central to the *Perlman* exception," and reasoned that, since the allegedly confidential information had already been disclosed to government agents, there was no need for immediate appellate review. *Id.* at 228. We thus

dismissed the appeal for want of jurisdiction. The record here discloses no substantial breach of the claimed privilege that has already occurred. For this reason alone, we take jurisdiction over these appeals.

Since we will reach the merits, we must more fully set forth the relevant facts. Davis allegedly obstructed a grand jury that was investigating official corruption in the administration of former Cook County Sheriff James O'Grady. Before taking office, O'Grady, along with his undersheriff, James Dvorak, served as an officer of Special Operations Associates, Inc. (SOA), a Chicago security firm. Upon taking office in 1986, O'Grady and Dvorak resigned as officers of SOA but continued to be shareholders in the company. Michael Caccitolo and the appellant, Davis, also owned shares of SOA and served as its corporate officers after O'Grady and Dvorak left for the sheriff's office.

During O'Grady's tenure as sheriff, the Cook County Board of Commissioners, upon the recommendation of O'Grady and Dvorak, awarded Home Incarceration Systems of Northern Illinois, Inc. (HISNI), whose sole shareholder was Audrey Tokarz, a contract to provide and service equipment used as part of the County's home incarceration program. In late 1989, some people, including apparently some in the United States Attorney's office, suspected that HISNI was actually a front for SOA and that O'Grady and Dvorak had impermissibly used their influence to steer the home incarceration contract to HISNI. A grand jury was convened to investigate, and, on January 3, 1990, Davis was served, as president of SOA, with a subpoena demanding the following:

> For the period from January 1986 to the present, any and all *ORIGINAL* records and *ORIGINAL* received correspondence, and copies of any and all outgoing correspondence, involving business and/or financial transactions between Special Operations Associates and any of the following persons or entities: Audrey Tokarz; Home Incarceration Systems . . . .

Government's App. at 5. Shortly after the subpoena was served, Lydon informed the government that he would be representing Davis during the grand jury's investigation.

On January 8, 1990, Lydon met with an assistant United States attorney and an agent of the Federal Bureau of Investigation. He presented a completely innocent explanation of the relationship between SOA and HISNI. He further disclosed that Davis had made a series of personal loans to Tokarz to "start-up" HISNI. The assistant United States attorney responded that the grand jury was interested in Davis's relevant personal records as well as the corporate records of SOA. He indicated that he would serve a "personal records" subpoena on Davis to supplement the first, corporate-records subpoena. This subpoena was issued on January 9, 1989 and commanded Davis to produce "[a]ny and all *ORIGINAL* documents, checks and other records of any kind relating to financial, loan, and/or business transactions between Daniel Davis and any of the following persons or entities: Audrey Tokarz; Home Incarceration Systems of Northern Illinois . . . ." Government's App. at 8.

Caccitolo instructed Betty Ann Wasson, SOA's office manager, to compile the documents demanded by the January 3 subpoena of SOA's corporate records. On January 12, 1990, Lydon transmitted to the government the assembled documents under a cover letter stating that they were "all original documents which respond to the subpoena . . . dated December 28, 1989."[4] Government's App. at 10. On January 16 and February 1, Lydon sent to the government documents demanded by the January 9 personal records subpoena. On May 30, 1990, the government learned of the existence of an unexecuted agreement pursuant to which Tokarz would have been required to sell, upon demand, all of her HISNI shares to

[4] The grand jury issued the SOA corporate records subpoena, served on Davis on January 3, 1990, on December 28, 1989.

Davis and Caccitolo at a pre-arranged, bargain price.[5] The next day, Davis delivered to Lydon for the first time an unsigned copy of this proposed agreement. Lydon informed the government of this document's existence on July 13, 1990, more than five months after Davis ostensibly complied with both subpoenas.

Davis himself then became the target of a grand jury probe. Lydon was subpoenaed to testify before the grand jury. In response to certain questions put to him about his dealings and conversations with Davis regarding Davis's compliance with the subpoenas, Lydon asserted the attorney-client privilege. Davis was nevertheless indicted. The government thereafter informed Lydon of its intention to call him as a witness at Davis's trial. The government also informed Lydon of its position that Davis had waived his attorney-client privilege as to communications with Lydon under the so-called "crime/fraud exception." This prompted Davis to file a motion in limine, the denial of which is the subject of these appeals, seeking to bar the government's proposed questioning of Lydon.

The theory of the government's case against Davis is best stated in the indictment returned against him: "Davis . . . corruptly endeavored to influence, obstruct and impede the due administration of justice, in that [Davis] concealed and intentionally failed to produce . . . in response to the grand juries' subpoenas, a document in the form of an agreement or proposed agreement [between Davis and Tokarz]." Government's App. at 211. The government's theory that certain of Davis's communications with Lydon fall outside the attorney-client privilege rests on the assertion that Davis used Lydon as his agent in perpetrating this obstruction. The district court concluded that the government had established a "prima facie" case that Davis

[5] Since Davis and Caccitolo were officers and shareholders of SOA, the existence of this proposed agreement was important evidence in the government's continuing investigation of a link between HISNI and SOA.

had "trick[ed] [Lydon] into providing false information to a grand jury during an investigation" and that their conversations in the course of this conduct are "not protected by the attorney-client-privilege." *United States v. Davis*, No. 91 CR 637, slip op. at 15 (N.D. Ill. July 1, 1992) (hereinafter Mem. Op & Ord.). We agree and thus affirm.

Our decision in this regard is governed by *Matter of Feldberg*, 862 F.2d 622 (7th Cir. 1985).[6] In that case, an attorney called before a grand jury invoked his client's attorney-client privilege in response to certain questions. The government contended that the privilege had been waived under the crime/fraud exception, charging that in the course of the legal representation the client had used the attorney to obstruct the grand jury's investigation. *Id.* at 624. We stated that to drive away the privilege under the fraud/crime exception "there must be 'something to give colour to the charge;' there must be 'prima facie evidence that it has some foundation in fact.' When that evidence is supplied, the seal of secrecy is broken." *Id.* at 625 (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933)). We also noted that "prima facie evidence" did not mean "enough to support a verdict in favor of the person making the claim." *Id.* Instead, we held that a party has established a prima facie case whenever it presents evidence sufficient "to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation." *Id.* at 626. We also stated that if the district court finds such an explanation satisfactory "the privilege remains" and that the district court's decisions regarding these matters may be disturbed only for an abuse of discretion. *Id.*

The linchpin of the district court's conclusion that Davis has waived the attorney-client privilege under the crime/fraud exception is its finding that

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[6] We decline Davis's invitation to overrule *Feldberg*.

> the plain language of the [January 3] subpoena indicates that the unexecuted agreement could have fallen within its scope and lends support to the government's charge that the defendant knew that the document was pertinent to the investigation of HISNI and SOA's relationship. Therefore, the existence of the subpoena lends support to the government's charge that the defendant used his attorney-client relationship to conceal this document from the government.

Mem. Op. & Ord. at 10.[7] Davis concedes that these circumstances require an explanation. Along this line, Davis contends that the district court erred because the proposed agreement was not subject to the January 3 subpoena and that if anyone concealed the document it was Caccitolo not he. Davis might be right. To secure a conviction on the crime charged in the indictment, the government will presumably have to prove, beyond a reasonable doubt, that the unexecuted agreement was within the reach of one of the two subpoenas served on Davis and that he intentionally concealed it.[8] But at this stage of the proceedings, the government need not prove its case. All that is needed is something "to give color to the charge" that Davis used Lydon as his agent in obstructing the grand jury's investigation. Whether pale or rich or vivid, there is indubitably color here.

The district court explained that the proposed agreement might be included under the description "original correspondence," Mem. Op. & Ord. at 9, and, if the docu-

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[7] The government argues that the same reasoning could be invoked with respect to the January 9 subpoena for Davis's personal records. But the district court made no reference to the second subpoena. Since we are reviewing the district court's decision for an abuse of discretion, we will limit our discussion to matters addressed by the district court.

[8] Although the government may also be right that a person can violate 18 U.S.C. § 1503 in a host of ways, Davis is charged here only with concealing and failing to produce a document in response to certain grand jury subpoenas.

ment was sent to Davis or Caccitolo in their official capacities, this is certainly a plausible conclusion. The district court also noted, quite reasonably we find, that the phrase "original records" could reach "all documents relating to SOA." *Id.* Keeping in mind Davis's and Caccitolo's significant proprietary interests in SOA, as well as their positions as corporate officers, it does not defy reason to conclude that the document in question was somehow related to SOA. Wasson's testimony to the grand jury that she prepared the proposed agreement while working as SOA's office manager further supports this conclusion. Government's App. at 55-57. Davis merely contends that the document could not have been a corporate record of SOA because "the document was kept in a file containing only Davis' personal records." Appellant's Br. at 27. If this were true, corporate officers could remove any document from the reach of persons investigating the corporation itself merely by putting it in a file marked "personal." We cannot credit an argument that would invite such patent abuse.

Davis also argues that the document in Davis's possession was not an "original" but a copy. The district court, however, concluded that "the word 'original' can also be used to describe more than one copy of a document as long as these copies are made at the same time as the first copy." *United States v. Davis*, No. 91 CR 637, slip op. at 6 (N.D. Ill. July 22, 1992). And Wasson testified to the grand jury that she made three photocopies of the proposed agreement, including the one in Davis's "personal file," at the same time that she prepared the "original." Government's App. at 62. The district court essentially held that an "original" is the document itself and anything else the parties intend to treat as such. Photocopies made contemporaneously with the completion of the "primary" version of the document would readily satisfy this definition. This rationale is consistent with Federal Rule of Evidence 1001(3) and is not an abuse of discretion.

In sum, we conclude that the district court did not abuse its discretion in finding a prima facie case, which Davis

did not adequately rebut, that Davis engaged his attorney in fraudulent or criminal activity. We have noted the district court's primary reason for finding that Davis had waived the attorney-client provision under the crime/fraud exception: Davis apparently represented through his attorney that he had complied with the January 3 subpoena when he knew that he had not. This reason seems adequate, and we conclude that it alone could support the court's denial of Davis's motion seeking to bar Lydon's testimony. We have also reviewed the other justifications that the district court offered in support of its decision. *See* Mem. Op. & Ord. at 10-14. These other points also tend to show that Davis was attempting to conceal the existence of the proposed agreement and was using his attorney for that purpose. They buttress the conclusion that Davis has lost his right to assert the attorney-client privilege.

The attorney-client privilege is of crucial importance to our jurisprudence, and its derogation is not to be undertaken lightly. The privilege is waived, however, when the client uses the attorney-client relationship to engage in fraudulent or criminal activity rather than merely to defend against charges. The district court expressly limited the government's inquiry to "asking Lydon whether, during the course of his representation of Davis, Davis admitted lying to him about the existence of the pertinent document and his compliance with the grand jury's subpoena." Mem. Op. & Ord. at 15-16. *Compare Feldberg*, 862 F.2d at 627 (a client's inquiries of his attorney whether a document falls within the scope of a subpoena, and, if so, whether it must be produced, are privileged conversations). With this important restriction, the district court's denial of Davis's motion was well within its discretion.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 5, 1993

BEFORE:

Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable RICHARD A. POSNER, Circuit Judge
Honorable JESSE E. ESCHBACH, Senior Circuit Judge

Nos. 92-2822 & 92-3153

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DANIEL M. DAVIS,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 CR 637—Ann Claire Williams, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 12, 1993.

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 92-2822 & 92-3153 v.

DANIEL M. DAVIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 CR 637—Ann Claire Williams, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc and the Government's response thereto, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

[Dated July 1, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case
v.	)	No. 91 CR 637
	)	**Under Seal**
	)	
DANIEL M. DAVIS	)	

MEMORANDUM OPINION AND ORDER

Defendant Daniel M. Davis ("Davis") was indicted in this case on August 1, 1991 and charged with one count of obstruction of justice in violation of 18 U.S.C. § 1503 ("Section 1503"). Specifically, the indictment alleges that Davis concealed a document during the course of a grand jury investigation. Davis has filed a motion in limine to prevent the government from subpoenaing his former attorney, Matthias Lydon ("Lydon"), to testify at trial. For the reasons stated below, the court denies the defendant's motion.

Background

Before former Cook County Sheriff James O'Grady ("O'Grady") and former Undersheriff James Dvorak ("Dvorak") took office, they were officers of Special Operations Associates, Inc. ("SOA"), a Chicago security firm. After taking office in 1986, pursuant to severance agreements prepared at that time, they remained SOA

officers. During the course of their administration, the Cook County Jail was negotiating with private entities to manage its electronic monitoring-home incarceration project. Home Incarceration Systems of Northern Illinois, Inc. ("HISNI") obtained a portion of a contract with Cook County to manage this project. Audrey Tokarz ("Tokarz") was listed as the sole shareholder of HISNI.

As of late December 1989, there was suspicion that HISNI was actually a front company for SOA and that O'Grady and Dvorak had used their influence to steer the home incarceration contract to HISNI. The government began a grand jury investigation and, on December 29, 1989, a grand jury subpoena was issued requesting records from SOA. The subpoena, served on Davis in his capacity as a SOA corporate executive on January 3, 1990, in pertinent part, requested:

> For the period from January 1986 to the present, any and all *ORIGINAL* records and *ORIGINAL* received correspondence, and copies of any and all outgoing correspondence, involving business and/or financial transactions between Special Operations Associates and any of the following persons or entities: Audrey Tokarz; Home Incarceration Systems, Inc. . . .[1]

The Section 1503 claim against defendant Davis arises out of Davis' purported concealment of a document which should have been produced pursuant to this subpoena. The document at issue is an unsigned agreement between Tokarz, Davis, and Michael Caccitolo ("Caccitolo"), another SOA executive. This document purportedly requires Tokarz, upon demand, to sell all her shares in HISNI at

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[1] Defendant's Memorandum in Support of Motion in Limine Regarding Subpoena to Defendant's Former Attorney ("Defendant's Memorandum"), Exhibit 3 (emphasis in original).

a prearranged price, to Davis and Caccitolo. The government believed that Davis and Caccitolo would receive Tokarz's shares in their capacity as representatives of SOA and that the unexecuted agreement was highly pertinent to the grand jury's investigation of whether HISNI served as a front company for or had a significant relationship with SOA.

On January 8, 1990, Lydon, acting as counsel for SOA, Davis and Caccitolo, met with Assistant United States Attorney Thomas J. Scorza (the "January 8 meeting"). Lydon disclosed that Davis had made personal loans to Tokarz which Tokarz had used to start up HISNI. Based upon Lydon's representations, a subpoena was issued on January 9, 1990 by the government requesting:

> [any] and all *ORIGINAL* documents, checks and other records of any kind relating to financial, loan, and/or business transactions between Daniel Davis and any of the following persons or entities: AUDREY TOKARZ, HOME INCARCERATION SYSTEMS OF NORTHERN ILLINOIS, INC. . . .

Defendant's Memorandum, Exhibit 4 (emphasis in original). Shortly thereafter, the defendant sent numerous personal records to the government, but not the unsigned agreement with Tokarz.

After these documents were produced, the government obtained additional information regarding the HISNI/SOA matter which led to the discovery on May 30, 1990 of the agreement requiring Tokarz to sell all her shares in HISNI to SOA.[2] Around May 31, 1990, Davis gave the unex-

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[2] The government learned this information when it made a consensually-monitored phone call to a SOA employee and recorded a conversation between a cooperating government witness and

(Footnote continued on following page)

ecuted agreement to Lydon and on July 13, 1990, Lydon gave it to the Government.

On January 10, 1991, Lydon was called to testify before the grand jury investigating Davis' actions. In response to certain questions about his dealings and conversations with Davis, Lydon asserted the attorney-client privilege and declined to answer. On October 7, 1991, the government issued a subpoena for Lydon's trial testimony. The government subsequently informed Lydon that it intended to call him as a witness at Davis' trial to testify regarding Davis' alleged violation of Section 1503. The government explained that pursuant to the crime/fraud exception, Davis had waived his attorney-client privilege as to communications he had with Lydon during the course of Lydon's representation of Davis.[3]

The defendant filed a Motion for Disclosure of Matters Potentially Subject to Attorney-Client Privilege. The government responded to the defendant's request by detailing the government's position on the crime/fraud exception and providing illustrative questions that it intended to ask Lydon at trial. *See* Defendant's Memorandum, Exhibit 1. Defendant then filed this motion in limine to prevent Lydon's testimony at trial.

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[2] *continued*

Caccitolo. This witness informed Caccitolo that the government would obtain grand jury testimony regarding the Tokarz agreement. Caccitolo immediately told Davis, who was present during the phone conversation, about the testimony.

[3] *See* Appendix to Government's Answer to Defendant's January 7, 1992 Memorandum in Support of his Motion in Limine Regarding Subpoena to Defendant's Former Attorney ("Appendix"), Exhibit E.

The Motion In Limine
Regarding Lydon's Testimony

The attorney-client privilege is intended to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *United States v. Zolin*, 491 U.S. 554, 562 (1989) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Generally, the attorney-client privilege can be invoked:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (citing 8 Wigmore § 2292). The burden falls on the party seeking to invoke the privilege to establish all the essential elements. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991).

Since the privilege has the effect of withholding relevant information from the factfinder, the privilege only applies where necessary to achieve its purpose. *Zolin*, 491 U.S. at 562. "The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—'ceases to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*.' " *Id.* at 562-63 (citing 8 Wigmore § 2298) (emphasis in original). The attorney-client privilege does not extend to communications made "for the purposes of getting advice for the commission of a fraud" or crime. *Id.* at 563.

The Seventh Circuit has addressed the application of the crime/fraud exception in *In the Matter of Feldberg*, 862 F.2d 622 (7th Cir. 1988). In *Feldberg*, a grand jury was investigating agents who signed amateur athletes to undisclosed contracts. The grand jury issued a subpoena to World Sports and Entertainment ("World Sports"), calling for all contracts between World Sports and college football players. In response to the subpoena, Michael Feldberg ("Feldberg"), the attorney and substitute records keeper for World Sports, produced numerous contracts. Not satisfied with these records, the grand jury made a further request for documents and Feldberg then produced seven more contracts. Six of the seven contracts had been post-dated to make it appear that they had been properly signed after the athletes' college careers had ended. These disclosures revealed that World Sports made a practice of surreptitiously contracting with amateur athletes. *Id.* at 623.

Because World Sports failed to immediately turn over all the requested documents, the grant jury investigated allegations of obstruction of justice. *Id.* at 623-24. When the grand jury summoned attorney Feldberg to testify about how he obtained the initial batch of contracts, Feldberg asserted the attorney-client privilege in response to some of the questions. The district court instructed Feldberg to answer and the defendants immediately filed an appeal. *Id.* at 624.

In considering the validity of the defendants' claim of the attorney-client privilege in *Feldberg*, the Seventh Circuit explained that the court need not try to determine whether an innocent explanation for the defendants' failure to turn over all the requested documents was more likely than a culpable one. "To drive the privilege away, there must be 'something to give colour to the charge;'

there must be 'prima facie evidence that it has some foundation in fact.' When that evidence is supplied, the seal of secrecy is broken." *Id.* at 625 (citing *Clark v. United States*, 289 U.S. 1, 15 (1933)).

In *Feldberg*, the court further explained that presenting prima facie evidence to establish that the seal of the attorney-client privilege has been broken does not require evidence sufficient to support a verdict. Rather, it is only necessary to provide evidence which calls for further inquiry. As the *Feldberg* court explained, "a prima facie case must be defined with regard to its function: to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation." *Id.* at 625. If the court ultimately determines that the explanation is satisfactory, the privilege remains. *Id.* at 625. Therefore, this court must analyze the facts the government relies upon in order to determine whether the attorney-client privilege will be applicable here.

Before determining whether the government has established a prima facie case, the court must first analyze the language in the January 3 subpoena. Defendant claims that, as worded, the subpoena did not require the production of the document in question because it was very narrow and only requested documents relating to completed business transactions. Defendant reasons that since the agreement requiring Tokarz to transfer her shares to SOA was never signed, this document was not called for by the subpoena.

This court disagrees with the defendant's narrow construction of the subpoena. If the subpoena stated that SOA was required to turn over documents relating to completed business or financial transactions, the defendant

would be correct and this court could rule as a matter of law that the defendant was not required to turn over the unexecuted document with Tokarz. However, the plain language of the January 3 subpoena requires SOA to turn over "original records and original received correspondence, and copies of any and all outgoing correspondence, involving business and/or financial transactions," which allows for a much broader interpretation than defendant suggests.[4] There are two possible theories under which defendant could have been required to turn over the unsigned Tokarz agreement. Under the subpoena, defendant could have been required to turn over the document as "original correspondence." Even if the Tokarz document does not fall within the narrower definition of "correspondence," defendant nevertheless could have been required to turn over the document under the definition of "original records." "Records" could be read to include all documents relating to SOA. Since the unexecuted agreement could fall within the scope of the subpoena, whether the defendant wrongfully concealed it from government investigators is a question for the jury to decide. Having resolved that the subpoena could require production of the unexecuted agreement, the court turns to the specific facts relied upon by the government to establish a prima facie case of waiver.

The court will discuss each series of facts on which the government relies and defendant's corresponding argu-

[4] Since defendant turned over the unsigned agreement in response to the government's subpoena for original records and original correspondence and since there is no evidence to the contrary, this court assumes that the document received by the government is an original. If there is evidence to the contrary, defendant should come forward with that evidence.

ments. (1) An expose article was published in the Chicago Tribune on December 31, 1989 regarding possible improprieties by O'Grady and Dvorak. The article focused on apparent connections between HISNI and SOA and explored the possibility of financial connections between Tokarz, Caccitolo, and Davis. Based upon information provided to the government by the Tribune prior to its publication of the expose, the government issued several subpoenas for relevant corporate records of SOA which was served on Davis. The defendant basically does not dispute these facts.

(2) The government issued the January 3 subpoena and served it on Davis. As previously noted, the plain language of the subpoena indicates that the unexecuted agreement could have fallen within its scope and lends support to the government's charge that the defendant knew that the document was pertinent to the investigation of HISNI and SOA's relationship. Therefore, the existence of the subpoena lends support to the government's charge that the defendant used his attorney-client relationship to conceal this document from the government.

(3) Tokarz denied the existence of the agreement when she was interviewed by the government. At her March 1990 proffer session, Tokarz offered the government an innocent account of her relationship with Davis and specifically denied that there had ever been an agreement requiring her to transfer her HISNI stock to Davis or anyone else. Defendant contends that Tokarz's statements are irrelevant to the present inquiry because Tokarz's statements cannot be attributed to Davis. However, this court finds that Tokarz's statements can be considered by the court in determining whether the government has established a prima facie case. Tokarz's statement at her

proffer session that Davis never suggested that she transfer her interest in SOA to him in order to repay the notes, gives color to the government's charge that Davis used his attorney-client relationship to further an ongoing fraud. The fact that the statement was not made by Davis does not affect this determination.

The defendant also argues that Tokarz's statements do not help establish the requisite prima facie case because the government has misinterpreted Tokarz's statements. This court disagrees. At her proffer session, Tokarz stated that "Davis never suggested to her the transfer of any interest in the company to him in order to repay the notes." Defendant's Exhibit 12, at 7.[5] This court finds that Tokarz's statement indirectly indicates that she denied that any agreement to transfer her SOA shares existed or was discussed as the government suggests. Therefore, Tokarz's statement adequately supports the government's claim that Davis waived his attorney-client privilege.

(4) At his February 1990 proffer session, Davis denied that there had ever been an agreement with Tokarz obli-

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[5] Davis argues that the government's reliance upon this statement is not supported by the contemporaneous record of the Tokarz interview. Davis contends that the FBI agent's 302 report of the interview only indicates that Tokarz stated that "Davis never suggested to her the transfer of any interest in the company to him in order to repay the notes." *See* Defendant's Exhibit 12 at 7. Davis claims that this statement is not a denial that any agreement to transfer ever existed or was discussed as the government suggests. This issue need not be addressed at this time because the exact meaning of Tokarz's statement is not at issue in this motion. Davis will have the opportunity at trial to cross-examine the agent regarding the statements recorded in his 302 report. To resolve the present motion, the issue is whether Tokarz's statements lend credence to the government's claim that Davis waived his attorney-client privilege.

gating her to transfer her HISNI stock. Davis contends that statements he purportedly made at his proffer interview cannot properly be relied upon because to rely on these statements would contravene the proffer agreement's requirement that Davis' statements not be used against him by the government in its case in chief. Neither the government nor Davis has submitted the pertinent proffer agreement to the court or any case law on this point.[6] Assuming that defendant has accurately explained its contents, this court is not convinced that Davis' statements at his proffer session cannot be considered when determining whether to pierce the attorney-client privilege. The fact that the government has agreed not to use Davis' statements against him in its case in chief does not mean that this court cannot consider Davis' statements for the limited purpose of determining the preliminary question of whether Lydon can testify. Assuming arguendo that consideration of Davis' statements from his proffer interview inappropriate, this court still finds that the other evidence presented by the government is sufficient to pierce the attorney-client privilege.

(5) On January 8, 1990, Lydon met with and told the government that Davis had made personal loans to Tokarz. Defendant argues that the government cannot rely on Lydon's statement because Lydon's meeting and what was discussed with the government was pursuant to a proffer agreement. Although there is no document submitted to the court that reflects the terms of the alleged proffer agreement, this court finds that, as with the Davis

[6] A copy of this proffer agreement should be submitted to the court.

proffer, this statement can be utilized in determining whether Davis waived his attorney-client privilege.[7]

Defendant also claims that nothing Lydon said at this meeting about Tokarz's relationship with SOA was untrue nor that Lydon was asked whether an agreement existed between Tokarz and Davis. Indeed, the defendant claims that Lydon's disclosure of new, factually correct information, namely that Davis had loaned money to Tokarz, suggests that Davis did not attempt to use his attorney-client relationship to conceal facts from the government. However, the fact that Lydon disclosed certain information or that he did not make any untrue statements about Tokarz's relationship with SOA and Davis does not affect this court's determination that the government has established the requisite prima facie case. The information that the government obtained from Lydon lends color to its charge that Davis may have used his attorney to perpetrate a fraud.

(6) A government trial witness will testify about the steps taken by Davis between January 9 and 16, 1990 to conceal the document by directing its removal from the set of documents that were to be sent to Lydon who would, in turn, give the documents to the government.[8]

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[7] The government argues that there was no proffer agreement with respect to this discussion. However, for the purposes of this opinion, this court will consider the facts as stated by defendant to be true.

[8] The government did not rely on this information in this matter because at the time the government filed its brief Davis did not have access to the pertinent testimony. Pursuant to this court's order on February 5, 1992, the government disclosed the name of the SOA employee who will be called to testify regarding Davis' concealment of the document in question. Davis will have the opportunity to cross-examine this witness at trial. Therefore, this court can and has relied on this information in its analysis. *See Feldberg*, 862 F.2d at 625.

This expected testimony is devastating to defendant's claim that he lacked intent to perpetrate a fraud.[9]

(7) Davis did not have his attorney turn over the document until approximately six months later, after Caccitolo told him that a witness would be testifying before the grand jury regarding the Tokarz agreement.[10]

This evidence, considered in conjunction with the other persuasive evidence provided by the government, establishes a prima facie case that Davis waived his attorney-client privilege. It adequately suggests that Davis knew that the government was interested in his relationship with Tokarz, as well as SOA's relationship with her. Also, the evidence adequately establishes that Davis received subpoenas for SOA documents relating to Tokarz and HISNI and later, for his own documents relating to Tokarz and HISNI. Yet, Davis did not turn over the document in question.

The defendant argues that this evidence does not demonstrate that a clear duty to divulge information was knowingly violated as it was in *Feldberg*. While this court agrees with the defendant that the instant case does not present as obvious a violation as that in *Feldberg*, the court finds that the evidence provided is sufficient to break the seal of secrecy between Lydon and Davis. The government is not required to prove beyond a reasonable

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[9] This court recognizes that evidence of intent is not required to waive the attorney-client privilege. *See Feldberg*, 862 F.2d at 625. However, the proposed testimony of the government's witness suggests that, contrary to defendant's reasoning, the government can show that Davis intended to commit a crime or perpetrate a fraud.

[10] *See* footnote 3.

doubt that Davis waived his attorney-client privilege. Rather, it is only required to establish a prima facie case that Davis waived this privilege by using his attorney-client relationship to further an ongoing fraud. *See Feldberg*, 862 F.2d at 625. Moreover, this court finds that the defendant's attempt to explain why this evidence does not indicate that he has waived his attorney-client privilege are not sufficient to uphold the attorney-client privilege. Therefore, the court will direct attorney Lydon to testify at trial.

The defendant contends that even if this court finds that Davis waived his attorney-client privilege, the government cannot ask Lydon whether Davis admitted that he had previously lied to him about the non-existence of the pertinent document and about his compliance with the grand jury's subpoena in this case. The defendant argues that this question is beyond the scope of any waiver of the attorney-client privilege because the question relates to alleged past misconduct which would remain protected. *See Zolin*, 491 U.S. at 562-63. The government assures the court that it will not ask Lydon whether, when he first became Davis' counsel, Davis made any admissions about the crime with which he is charged in this case. The government properly recognizes that such a question would be inappropriate.

However, the government may ask Davis about on-going misconduct during the course of Lydon's representation of him. On-going misconduct, such as tricking one's attorney into providing false information to a grand jury during an investigation, is not protected by the attorney-client privilege. *See Id.* Therefore, this court will not prevent the government from asking Lydon whether, during the course of his representation of Davis, Davis admitted

lying to him about the existence of the pertinent document and his compliance with the grand jury's subpoena.

Conclusion

For the foregoing reasons, the court denies defendant's motion in limine regarding the subpoena of defendant's former attorney to testify at trial. For purposes of appeal, time begins to run from the date that this memorandum opinion and order was entered.

ENTER:

/s/ Ann Claire Williams
Ann Claire Williams, Judge
United States District Court

Dated: July 1, 1992

[Dated July 22, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case
v.	)	No. 91 CR 637
	)	**Under Seal**
	)	
DANIEL M. DAVIS	)	

MEMORANDUM OPINION AND ORDER

Defendant Daniel M. Davis ("Davis") was indicted in this case on August 1, 1991 and charged with one count of obstruction of justice in violation of 18 U.S.C. § 1503 ("Section 1503"). Specifically, the indictment alleges that Davis concealed a document during the course of a grand jury investigation into the relationship between Home Incarceration Systems of Northern Illinois, Inc. ("HISNI") and Special Operations Associates, Inc. ("SOA"). This case is currently before the court on defendant's motion to reconsider the court's ruling allowing the government to subpoena Davis' former attorney, Matthias Lydon ("Lydon"), defendant's motion to strike references to the expected testimony of Betty Ann Wasson which was mentioned for the first time in the government's response to defendant's motion to reconsider, and the government's motion to supplement the record with Wasson's grand jury testimony. For the reasons stated below, the court denies defendant's motions to reconsider and to strike, and grants the government's motion to supplement the record. Defendant is given leave to file objections by July 25, 1992.

Background

In late 1989, a grand jury was investigating whether HISNI was actually a front company for SOA and whether former Cook County Sheriff James O'Grady ("O'Grady") and former Undersheriff James Dvorak ("Dvorak"), who were officers of SOA, had used their influence to steer an electronic monitoring-home incarceration project for the Cook County Jail to HISNI.[1] On January 3, 1990, as part of its investigation into this matter, the grand jury issued a subpoena and served it on Davis in his capacity as a SOA corporate executive. This subpoena, in pertinent part, requested:

> For the period from January 1986 to the present, any and all *ORIGINAL* records and *ORIGINAL* received correspondence, and copies of any and all outgoing correspondence, involving business and/or financial transactions between Special Operations Associates and any of the following persons or entitles: Audrey Tokarz, Home Incarceration Systems, Inc. . . .[2]

The Section 1503 claim against Davis arises out of Davis' purported concealment of a document which should have been produced pursuant to the January 3 subpoena, but was not produced until July 1990. The document at issue is an unsigned agreement between Audrey Tokarz ("Tokarz"), the sole shareholder of HISNI, Davis, and Michael Caccitolo ("Caccitolo"), another SOA executive. This document purportedly requires Tokarz, upon demand, to sell all her shares in HISNI at a prearranged price, to Davis

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[1] For a thorough explanation of the grand jury investigation, see *United States v. Davis*, 91 CR 637 (N.D. Ill. July 1, 1992).

[2] Defendant's Memorandum in Support of Motion in Limine Regarding Subpoena to Defendant's Former Attorney, Exhibit 3 (emphasis in original).

and Caccitolo. The government believes that Davis and Caccitolo would receive Tokarz's shares in their capacity as representatives of SOA and that the unexecuted agreement was highly pertinent to the grand jury's investigation of whether HISNI served as a front company for or had a significant relationship with SOA.

In January 1991, Lydon, Davis' former attorney, was called to testify before the grand jury investigating Davis' actions. In response to certain questions about his dealings and conversations with Davis, Lydon asserted the attorney-client privilege and declined to answer. The government informed Lydon that it intended to call him as a witness at Davis' Trial to testify regarding Davis' alleged violation of Section 1503. The government explained that pursuant to the crime/fraud exception, Davis had waived his attorney-client privilege as to communications he had with Lydon during the course of Lydon's representation of Davis. Defendant filed a motion for disclosure of matters potentially subject to the attorney-client privilege to which the government responded. Defendant then filed a motion in limine to prevent Lydon's testimony at trial.

On July 1, 1992, this court denied defendant's motion in limine to prevent Lydon's testimony at trial. In ordering that Lydon could be called to testify, this court found that the government presented sufficient evidence to establish a prima facie case that the seal of the attorney-client privilege had been broken. *See In the Matter of Feldberg*, 862 F.2d 622, 625 (7th Cir. 1988). In making this determination, this court held that the January 3 subpoena did not merely require SOA to turn over documents relating to completed business or financial transactions as defendant suggested. Rather, this court found that the plain language of the subpoena called for "original records

and original received correspondence, and copies of any and all outgoing correspondence, involving business and/or financial transactions . . ." which allowed for a much broader interpretation of the subpoena. In reaching this conclusion, this court assumed that the unsigned Tokarz agreement received by the government was an original.

The Motion to Reconsider

Defendant now brings this motion to reconsider based upon the narrow issue of whether the unsigned Tokarz agreement was an original.[3] Defendant argues that the agreement was not an original and therefore, Davis was not required by the January 3 subpoena to turn the document over to the government. In its response, the government outlines the expected testimony of Betty Ann Wasson ("Wasson"), the executive secretary/office manager for Davis and Caccitolo at SOA at the time in question. The government expects Wasson to testify regarding how she prepared the unsigned Tokarz agreement and the steps she took in gathering materials requested by the government in the January 3 subpoena, including the unsigned Tokarz agreement. Defendant claims that this information should be stricken because a detailed discussion of Wasson's testimony is beyond the limited scope of his motion

[3] Defendant brought this motion in response to footnote 4 on page 8 of the court's July 2, 1992 order which stated:

> Since defendant turned over the unsigned agreement in response to the government's subpoena for original records and original correspondence and since there is no evidence to the contrary, this court assumes that the document received by the government is an original. If there is evidence to the contrary, defendant should come forward with that evidence. *United States v. Davis*, No. 91 CR 637 (N.D. Ill. July 1, 1992).

to reconsider. However, this court agrees with the government that it needed to include information regarding Wasson's expected testimony in order to put its claim that the document is an original in context. Therefore, the court denies defendant's motion to strike.

The court also denies defendant's motion to reconsider and finds that the unsigned Tokarz agreement could be an original.[4] The court recognizes that the word "original" can be defined in several ways. Defendant appears to suggest that the word "original" should be given a narrow definition, only covering the document itself or its first copy. However, the word "original" can also be used to describe more than one copy of a document as long as these copies are made at the same time as the first copy. In the instant case, the government expects Wasson to testify that after she typed the unsigned Tokarz agreement, she immediately made three copies of it. Based upon the representations made by the government, the document turned over by Davis appears to be one of these three copies of the agreement. This court finds that the original copy of the agreement which was turned over to the government can qualify as an original for the purposes of the January 3 subpoena. Therefore, as stated in open court on July 20, 1992, defendant's motion to reconsider is denied.

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[4] In raising the question of whether the document is an original, the court sought a clearer explanation of how the disputed document was prepared and turned over to the government. Although the court considered whether the document is an original in reaching its determination, the court primarily based the decision on the prima facie case established by the government which was thoroughly discussed in the court's earlier opinion.

At the July 20 hearing, the government moved to supplement the record, which includes a summary of Wasson's testimony, with her grand jury testimony. Defendant objected on the grounds that this request was untimely and went well beyond the narrow issue presented in his motion. In addition, defendant will dispute some of Wasson's testimony. This court agrees with the government that it is appropriate to supplement the record with Wasson's grand jury testimony since the court only relied upon a summary of her testimony. Defendant is given leave to file objections to that testimony by July 25, 1992. If the filed objections suggest that it is warranted, the court will hold a hearing to resolve any factual disputes.

Conclusion

For the reasons stated above, the court denies defendant's motion to reconsider and motion to strike. The court grants the government's oral motion to supplement the record and gives defendant leave to file objections by July 25, 1992.

ENTER:

/s/ Ann Claire Williams
Ann Claire Williams, Judge
United States District Court

Dated: July 22, 1992

App. 34

[Dated August 26, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case
v.	)	No. 91 CR 637
	)	**Under Seal**
	)	
DANIEL M. DAVIS	)	

MEMORANDUM OPINION AND ORDER

Defendant Daniel M. Davis ("Davis") was indicted in this case on August 1, 1991 and charged with one count of obstruction of justice in violation of 18 U.S.C. § 1503. Specifically, the indictment alleges that Davis, an executive at Special Operations Associates, Inc. ("SOA"), concealed a document (the "document") during the course of a grand jury investigation into SOA's relationship with Home Incarceration Systems of Northern Illinois, Inc. ("HISNI") and its sole shareholder, Audrey Tokarz ("Tokarz").[1] The document is an unsigned agreement between Tokarz, Davis and Michael Caccitolo ("Caccitolo"), another SOA executive. This document purportedly requires Tokarz, upon demand, to sell all her shares in HISNI at a prearranged price, to Davis and Caccitolo. The government believes that Davis and Caccitolo would receive Tokarz's shares in their capacity as representatives of SOA

[1] For a more thorough explanation of the allegations in this case, see, *United States v. Davis*, 91 CR 637 (N.D. Ill. July 1, 1992).

and that the unexecuted agreement was highly pertinent to the grand jury's investigation of whether HISNI served as a front company for or had a significant relationship with SOA. The government contends that this document should have been produced immediately pursuant to the grand jury's January 3, 1990 subpoena. The document was not produced until July 1991.

On July 1, 1992, this court issued a memorandum opinion and order in this case denying defendant's motion in limine to prevent his former attorney, Matthias Lydon ("Lydon") from testifying at trial regarding Davis' alleged violation of Section 1503. In ordering that Lydon could be called to testify, this court found that the government had presented sufficient evidence to establish a prima facie case that the seal of the attorney-client privilege had been broken pursuant to the crime/fraud exception. *See In the Matter of Feldberg,* 862 F.2d 622, 625 (7th Cir. 1988). Among other evidence presented, this court, relied upon the government's assertion that Betty Ann Wasson ("Wasson"), the executive secretary/office manager for Davis and Caccitolo at SOA at the time in question, would testify about the steps taken by Davis to conceal the document. This court found that this testimony lent color to the government's charge that the attorney/client privilege had been broken. *See Id.*

This court noted in a footnote that the government had not relied upon Wasson's expected testimony because at the time that the government filed its brief, Davis did not have access to Wasson's testimony. *See United States v. Davis,* 91 CR 637 (N.D. Ill. July 1, 1992) at 13 footnote 8. Since the government disclosed this information in February 1992, this court determined that it could properly rely on Wasson's expected testimony when determining whether the government had established a prima

facie case that the attorney-client privilege should not prevent Lydon from testifying. This court also noted that defendant would have the opportunity to cross-examine Wasson at trial.

Defendant filed a motion to reconsider the court's July 1 decision on the narrow grounds that the document was not an original. Since the January 3 subpoena clearly called for original documents, defendant contended that he was not required to turn the document over to the government. On July 22, 1992, this court issued a memorandum opinion and order denying defendant's motion to reconsider and his motion to strike Wasson's expected testimony, and granting the government's oral motion to supplement the record with Wasson's grand jury testimony. In reaching this conclusion, this court again noted Wasson's expected testimony regarding how she prepared the document and the steps she took in gathering materials requested by the government in the January 3 subpoena, including the document. Defendant asserted that Wasson's testimony should be stricken because it was beyond the limited scope of his motion to reconsider. However, this court denied defendant's motion to strike because it found that the background regarding Wasson's expected testimony was necessary to put the government's claim that the document was an original in context.

This court also relied upon Wasson's expected testimony that when she typed up the document, she immediately made three copies of it. The government represented that one of these three copies was turned over to the government. Since this court found that these original copies could be considered "originals" under the January 3 subpoena, this court denied defendant's motion to reconsider. This court further determined that it was appropriate for the government to supplement the record with Wasson's

grand jury testimony since this court had relied upon it. Defendant was given leave to file objections to Wasson's testimony. If the filed objections suggested that it was warranted, this court stated that it would hold a hearing to resolve any factual disputes.

This case is currently before the court on defendant's objections to Wasson's testimony and his July 31, 1992 oral motion for a hearing. For the reasons stated below, defendant's motion is denied.

The Motion for a Hearing

Defendant raises various objections to the government's explanation of Wasson's expected testimony. The government expects Wasson to testify regarding her initial preparation of the document and the events surrounding the turning over of this document. Defendant objects to the government's characterization of this sequence of events, as well as objecting to many representations as inaccurate. Defendant contends that Wasson's testimony has been improperly infused into the record, since it was submitted in the government's response to defendant's motion for reconsideration. Therefore, defendant claims that a hearing is appropriate to resolve the factual disputes with respect to Wasson's testimony.

The government counters that defendant's objections should not be considered and a hearing is not necessary at this time because the contested issues are not relevant to the heart of the motions currently before this court. This court agrees. In support of its claim that the attorney-client privilege should not prevent Lydon from testifying, the government claimed that Wasson would testify about the steps taken by Davis to conceal the document. Regardless of defendant's objections to the details of this

expected testimony, the government's proffer clearly lends color to and calls for further inquiry into the government's charge that Davis used his attorney-client relationship to further his alleged crime. This is all that is required in this circuit. "To drive the privilege away, there must be 'something to give colour to the charge;' there must be 'prima facie evidence that has some foundation in fact.' When that evidence is supplied, the seal of secrecy is broken." *Feldberg*, 862 F.2d at 625 (citing *Clark v. United States*, 289 U.S. 1, 15 (1933)). Thus, as the government suggests, defendant's objections to Wasson's expected testimony do not affect the court's determination regarding this preliminary issue.

Defendant's objections also do not affect the court's determination regarding defendant's motion to reconsider. As defendant suggests, his motion for reconsideration was based upon the limited question of whether the document is an original for the purposes of the January 3 subpoena. Defendant does not contest the government's assertion that Wasson will testify that she typed the document and immediately made three copies of it. Also, defendant does not contest the government's representation that the document turned over by defendant appears to be one of these three copies. Defendant only objects to the government's assertion that Wasson is unsure whether the document she gave to defendant in January 1990 was an original or one of the photocopies. Defendant claims that one of the copies must have been turned over because Wasson testified before the grand jury that she found a *copy* of the document for defendant in January 1990. As previously stated, this court held that the three original copies of the document could qualify as originals for the purposes of the January 3 subpoena. Therefore, defendant's objections to Wasson's testimony does not affect the court's decision to deny defendant's motion to reconsider.

This court sees no indication that defendant's objections to Wasson's testimony affect this court's decision to deny defendant's motion to reconsider or his motion in limine to prevent Lydon from testifying. Since defendant's objections to Wasson's testimony go more to the heart of the case, and not the preliminary issues addressed by the court thus far, this court finds that a hearing is not warranted at this time. Defendant will have the opportunity to cross-examine Wasson at trial. This will be a more appropriate method for addressing defendant's objections to Wasson's testimony.

Conclusion

For the reasons stated above, defendant's objections to the testimony of Betty Ann Wasson and motion for a hearing are denied.

ENTER:

/s/ Ann Claire Williams
Ann Claire Williams, Judge
United States District Court

Dated: August 26, 1992

AGREEMENT

WHEREAS, Michael F. Caccitolo and Daniel M. Davis desire to enter into an agreement with Audrey Kies Tokarz, whereby, Michael F. Caccitolo and Daniel M. Davis shall have the right to purchase any and all shares of stock currently owned by Audrey Kies Tokarz in Home Incarceration Systems of Northern Illinois, Inc. (corporation).

NOW THEREFORE, in consideration of the recitals and promises contained herein, Michael F. Caccitolo, Daniel M. Davis and Audrey Kies Tokarz agree to the following:

RECITALS

1. Audrey Kies Tokarz currently owns 100% of the shares of stock in Home Incarceration Systems of Northern Illinois, Inc. and hereby agrees not to sell, trade, give away, offer as part of any financial settlement or agreement, or dispose of in any way, said 1,000 shares of stock, other than by the terms of this Agreement. In addition, Audrey Kies Tokarz agrees not to cause to be issued any additional shares of stock or to dilute her 100% ownership in any way.

2. Should Michael F. Caccitolo and Daniel M. Davis desire to purchase the said 1,000 shares of stock owned by Audrey Kies Tokarz in said corporation within sixty (60) months from the date hereof, Michael F. Caccitolo and Daniel M. Davis shall have the right to do so for an agreed upon price of fifty dollars ($50.00) per share.

3. In the event of the death of Audrey Kies Tokarz, Michael F. Caccitolo and Daniel M. Davis shall have the

same right to purchase the shares from the Estate of Audrey Kies Tokarz as described in No. 2 above.

IN WITNESS WHEREOF, the parties hereto have hereunder set their hands and seals this _____ day of November, 1988.

_____
Audrey Kies Tokarz

_____
Michael F. Caccitolo

_____
Daniel M. Davis

Supreme Court, U.S.
FILED
FEB 3 1994
OFFICE OF THE CLERK

No. 93-900

In the Supreme Court of the United States

OCTOBER TERM, 1993

DANIEL M. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the district court correctly determined that petitioner's former attorney could be required to testify, pursuant to the crime-fraud exception to the attorney-client privilege, concerning prior communications with petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-900

DANIEL M. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-10, is reported at 1 F.3d 606. The memorandum opinions of the district court, Pet. App. 13-27, 28-33, and 34-39, are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11) was entered on August 5, 1993. A petition for rehearing was denied on October 12, 1993. Pet. App. 12. The petition for a writ of certiorari was filed on December 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury sitting in the Northern District of Illinois returned an indictment charging petitioner with one count of obstruction of justice, in violation of 18 U.S.C. 1503. The indictment alleged that petitioner had concealed a document during the course of a grand jury investigation. After the indictment was returned, the government subpoenaed Matthias Lydon, the attorney who had represented petitioner during the grand jury investigation that he was alleged to have obstructed. Pet. App. 1. Petitioner moved in limine to bar any questioning of Lydon, but the district court denied the motion, relying on the crime-fraud exception to the attorney-client privilege. *Id.* at 13-27. The court of appeals affirmed. *Id.* at 1-10.

1. Petitioner was the president of Special Operations Associates, Inc. (SOA), a security firm based in Chicago, Illinois. In 1986, two officers of SOA, James O'Grady and James Dvorak, were selected as Sheriff and Undersheriff of Cook County, Illinois. They resigned their executive positions with SOA but continued to hold stock in the company. Based on the recommendation of O'Grady and Dvorak, the Cook County Board of Commissioners (Board) awarded a services contract to Home Incarceration Systems of Northern Illinois, Inc. (HISNI). Although the only listed shareholder of HISNI was Audrey Tokarz, the government suspected that HISNI was a front for SOA, and that O'Grady and Dvorak had influenced the Board's decision for their own financial gain. Pet. App. 4.

In late 1989, a federal grand jury began an investigation into SOA and HISNI. In early January of 1990, petitioner was served with two subpoenas. The first subpoena requested petitioner, as president of SOA, to pro-

vide "any and all *ORIGINAL* records and *ORIGINAL* received correspondence * * * involving business and/or financial transactions" between SOA and Audrey Tokarz or HISNI. Pet. App. 4. On January 12, 1990, Lydon transmitted documents to the government under a cover letter indicating that no other documents covered by the subpoena existed. The second subpoena was directed to petitioner personally and requested "[a]ny and all *ORIGINAL* documents, checks and other records of any kind relating to financial, loan, and/or business transactions" between petitioner and Audrey Tokarz or HISNI. *Id.* at 5. On January 16 and February 1, 1990, Lydon delivered to the government documents requested by the personal records subpoena. *Id.* at 4-5.

On May 30, 1990, the government learned of an unsigned agreement between Tokarz, petitioner, and Michael Caccitolo, another SOA officer and shareholder. The agreement gave petitioner and Caccitolo the right to buy all of Tokarz's stock in HISNI at a prearranged price. Pet. App. 5-6. On that same day, petitioner was informed by Caccitolo that the government could be expected to learn of the agreement's existence. The next day, petitioner for the first time delivered a copy of the agreement to Lydon, and on July 13, 1990, Lydon transmitted the document to the government. *Id.* at 15-16 & n.2.

2. Petitioner was indicted on one count of obstruction of justice, in violation of 18 U.S.C. 1503. The indictment alleged that he had "concealed and intentionally failed to produce . . . in response to the grand juries' subpoenas" the agreement between himself, Caccitolo, and Tokarz. See Pet. App. 6. After the indictment was returned, the government subpoenaed Lydon and informed him of its intention to call him as a witness at petitioner's trial. Petitioner filed a motion in limine, asserting that the

attorney-client privilege barred any questioning of Lydon. The district court denied the motion. Under the crime-fraud exception (see *id.* at 17), the court explained, "[o]n-going misconduct, such as tricking one's attorney into providing false information to a grand jury during an investigation, is not protected by the attorney-client privilege." *Id.* at 26. The court concluded that the government had established a prima facie case of wrongdoing, *id.* at 20-25,[1] and that petitioner's "attempt to explain why this evidence does not indicate that he has waived his attorney-client privilege [is] not sufficient to uphold the attorney-client privilege." *Id.* at 26.

3. The court of appeals affirmed.[2] To invoke the crime-fraud exception, the court held, a party must produce evidence sufficient to establish a prima facie case of the crime or fraud. The court explained the evidentiary showing required to establish a prima facie case (Pet. App. 7 (internal quotation marks omitted)):

> [A] party has established a prima facie case whenever it presents evidence sufficient to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation. * * * [I]f the district court finds such explanation satisfactory the privilege remains.

---

[1] The court noted in particular that "[s]ince the unexecuted agreement could fall within the scope of the subpoena, whether [petitioner] wrongfully concealed it from government investigators is a question for the jury to decide." Pet. App. 20.

[2] The court held that it had jurisdiction to review petitioner's interlocutory appeal because the allegedly privileged communications had not yet been disclosed. Pet. App. 3-4 (citing *United States* v. *Calandra*, 706 F.2d 225 (7th Cir. 1983)).

The court concluded that the government had established a prima facie case because the concealed agreement was covered by the "plain language" of the first subpoena served on petitioner, and petitioner did not produce the agreement until after he learned that the government knew of its existence, more than four months after he claimed to have fully complied with the subpoena. Pet. App. 7-8 & n.7, 21. Petitioner "concede[d] that these circumstances require an explanation," but claimed that the agreement was not subject to the subpoena, and that he was not responsible for concealing it. *Id.* at 8. The court acknowledged that petitioner might ultimately prevail at trial but noted that "at this stage of the proceedings, the government need not prove its case. All that is needed is something 'to give color to the charge' that [petitioner] used Lydon as his agent in obstructing the grand jury's investigation." *Ibid.* The court concluded that the government had established a prima facie case that the communications with Lydon served to further petitioner's commission of a crime, and it held that Lydon could be called as a witness at petitioner's trial. *Id.* at 8-10.

ARGUMENT

Petitioner claims that the courts below applied the wrong standard of proof in concluding that the government had established a prima facie case under the crime-fraud exception to the attorney-client privilege. He contends that the courts of appeals are in conflict over that standard, and that "the showing deemed sufficient" by the courts below "would not have satisfied [the] more exacting standards established in other Circuits." Pet. 13. Although there is undoubtedly some disparity between the courts of appeals as to the precise formulation of the applicable standard, in practical effect the decisions are

in accord. Moreover, petitioner would not be entitled to relief under any formulation of the standard. Further review is therefore unwarranted.

1. The attorney-client privilege generally protects from disclosure confidential legal communications between an attorney and his client. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). However, the privilege does not apply to such communications when they are in furtherance of a crime or fraud—when they relate "not to prior wrongdoing, but to future wrongdoing." *United States* v. *Zolin*, 491 U.S. 554, 562-563 (1989) (internal quotation marks and emphasis omitted). To overcome the privilege under the crime-fraud exception, this Court has stated, a party must establish a "prima facie" case of crime or fraud—"something to give colour to the charge." *Clark* v. *United States*, 289 U.S. 1, 15 (1933) (internal quotation marks omitted).

2. As the Court recognized in *Zolin*, the "use * * * of the phrase '*prima facie* case' to describe the showing needed to defeat the privilege has caused some confusion. * * * The quantum of proof needed to establish admissibility was * * * and remains, subject to question." 491 U.S. at 563-564 n.7. The courts of appeals have adopted different formulations of the prima facie standard. The Second and Sixth Circuits have held that a prima facie case is equivalent to a showing of "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof." *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984); see *In re Antitrust Grand Jury*, 805 F.2d 155, 165-166 (6th Cir. 1986) (adopting the Second Circuit's approach). Other circuits have described the test differently. See *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (party opposing the privilege must "offer[] evidence that if believed by the trier of fact would

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[3] In *In re Grand Jury Investigation*, 842 F.2d at 1226, the Eleventh Circuit stated that "a prima facie showing can be established by a good faith statement by the prosecutor as to what evidence is before the grand jury." In support of that statement, the court cited a case involving an affidavit concerning the information before a grand jury. *Ibid.* Thus, the court did not indicate that mere pleadings could establish a prima facie case, and its decision does not conflict with that of the Fifth Circuit in *In re Int'l Sys. & Controls Corp. Sec. Litigation*, 693 F.2d at 1242.

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3. The Seventh Circuit, we acknowledge, has framed the inquiry somewhat differently. That court has expressly rejected the "sufficient to support a verdict" standard, stating that "[t]he question here is not whether the evidence supports a verdict but whether it calls for inquiry." *In re Feldberg*, 862 F.2d 622, 625-626 (7th Cir. 1988). Under the Seventh Circuit's approach, however, the determination that a prima facie case has been established does not automatically lead to the revelation of communications that would otherwise be privileged. Rather, that determination "require[s] the adverse party, the one with superior access to the evidence

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and in the best position to explain things, to come forward with that explanation. If the court finds the explanation satisfactory, the privilege remains." *Id.* at 626 (citations omitted). In the present case, petitioner is incorrect in arguing (Pet. 13) that "the showing deemed sufficient by the Seventh Circuit would not have satisfied more exacting standards established in other Circuits." In order to invoke the crime-fraud exception to the attorney-client privilege, the initial burden was on the government to "present[] evidence sufficient 'to require [petitioner] * * * to come forward with [an] explanation.'" Pet. App. 7. As petitioner conceded below, the government's evidence—which indicated that petitioner had "represented through [Lydon] that he had complied with the * * * subpoena when he knew that he had not"—satisfied this requirement. *Id.* at 8, 10. Having determined that the government's submissions were sufficient to require an explanation, the courts below afforded petitioner the opportunity to respond to the government's evidence. The courts ultimately concluded, however, that petitioner's explanations were inadequate. Thus, contrary to petitioner's assertion (Pet. 14), the decision of the courts below to permit questioning of petitioner's attorney was based on far more than "the judicial equivalent of a raised eyebrow."

As petitioner points out (Pet. 13), the court of appeals acknowledged that petitioner "might be right" in arguing that the document in question lay outside the scope of the initial subpoena. Pet. App. 8. Contrary to petitioner's contention, however, uncertainty as to the subpoena's coverage would not preclude questioning Lydon under the crime-fraud formulations employed by other circuits. The district court made clear that it regarded the question whether the document was covered by the subpoena as an issue for the jury. *Id.* at 20. Implicit in

the district court's analysis, moreover, is the conclusion that a reasonable jury could find that the document fell within the scope of the subpoena and that petitioner had breached his legal obligation to produce it. The court expressly declined to "rule as a matter of law that the [petitioner] was not required to turn over the unexecuted document with Tokarz," and stated that "[s]ince the unexecuted agreement could fall within the scope of the subpoena, whether the [petitioner] wrongfully concealed it from government investigators is a question for the jury to decide." *Ibid.* The court therefore would have permitted Lydon to be questioned at trial even if it had framed the inquiry as whether the evidence was sufficient to support a verdict. There is consequently no basis for petitioner's contention that the courts below would have reached a different conclusion if they had employed one of the verbal formulations used by other courts of appeals.[4]

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[4] By letter to petitioner's current counsel dated December 3, 1991, the government set forth three "illustrative questions" that it intends to ask Lydon at trial. Those questions are as follows:

> 1. Mr. Lydon, at any time prior to May 31, 1990, did Daniel M. Davis ever state to you or in your presence that there had never been any form of agreement pursuant to which Audrey Tokarz would be required to sell or transfer her shares in HISNI to any person or entity?
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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
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agreement and about his compliance with the grand jury's subpoenas in this case?

The first two questions seek to elicit testimony regarding statements made by petitioner in furtherance of the alleged obstruction of justice, and in our view these questions clearly fall within the crime-fraud exception. The status of the third question is less certain. Admissions of prior wrongdoing could fall within the crime-fraud exception if they were part of an ongoing course of misconduct (*e.g.*, if petitioner admitted to Lydon that he had previously lied about the document in the course of his effort to persuade Lydon to continue to conceal its existence). We note in this regard that the document in question was not transmitted to the government until July 13, 1990. Thus, although petitioner delivered a copy of the agreement to Lydon on May 31, 1990, it is by no means clear that petitioner's criminal conduct ceased as of that date. Admissions of prior wrongdoing would be privileged, however, if made after petitioner's efforts to obstruct justice had ceased. At trial, the district court will of course be able to limit the examination of Lydon to questions pertaining to statements made by petitioner in furtherance of the crime or fraud.

No. 93-900

In the Supreme Court of the United States

OCTOBER TERM, 1993

DANIEL M. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly determined that petitioner's former attorney could be required to testify, pursuant to the crime-fraud exception to the attorney-client privilege, concerning prior communications with petitioner.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-10, is reported at 1 F.3d 606. The memorandum opinions of the district court, Pet. App. 13-27, 28-33, and 34-39, are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11) was entered on August 5, 1993. A petition for rehearing was denied on October 12, 1993. Pet. App. 12. The petition for a writ of certiorari was filed on December 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury sitting in the Northern District of Illinois returned an indictment charging petitioner with one count of obstruction of justice, in violation of 18 U.S.C. 1503. The indictment alleged that petitioner had concealed a document during the course of a grand jury investigation. After the indictment was returned, the government subpoenaed Matthias Lydon, the attorney who had represented petitioner during the grand jury investigation that he was alleged to have obstructed. Pet. App. 1. Petitioner moved in limine to bar any questioning of Lydon, but the district court denied the motion, relying on the crime-fraud exception to the attorney-client privilege. *Id.* at 13-27. The court of appeals affirmed. *Id.* at 1-10.

1. Petitioner was the president of Special Operations Associates, Inc. (SOA), a security firm based in Chicago, Illinois. In 1986, two officers of SOA, James O'Grady and James Dvorak, were selected as Sheriff and Undersheriff of Cook County, Illinois. They resigned their executive positions with SOA but continued to hold stock in the company. Based on the recommendation of O'Grady and Dvorak, the Cook County Board of Commissioners (Board) awarded a services contract to Home Incarceration Systems of Northern Illinois, Inc. (HISNI). Although the only listed shareholder of HISNI was Audrey Tokarz, the government suspected that HISNI was a front for SOA, and that O'Grady and Dvorak had influenced the Board's decision for their own financial gain. Pet. App. 4.

In late 1989, a federal grand jury began an investigation into SOA and HISNI. In early January of 1990, petitioner was served with two subpoenas. The first subpoena requested petitioner, as president of SOA, to pro-

vide "any and all *ORIGINAL* records and *ORIGINAL* received correspondence * * * involving business and/or financial transactions" between SOA and Audrey Tokarz or HISNI. Pet. App. 4. On January 12, 1990, Lydon transmitted documents to the government under a cover letter indicating that no other documents covered by the subpoena existed. The second subpoena was directed to petitioner personally and requested "[a]ny and all *ORIGINAL* documents, checks and other records of any kind relating to financial, loan, and/or business transactions" between petitioner and Audrey Tokarz or HISNI. *Id.* at 5. On January 16 and February 1, 1990, Lydon delivered to the government documents requested by the personal records subpoena. *Id.* at 4-5.

On May 30, 1990, the government learned of an unsigned agreement between Tokarz, petitioner, and Michael Caccitolo, another SOA officer and shareholder. The agreement gave petitioner and Caccitolo the right to buy all of Tokarz's stock in HISNI at a prearranged price. Pet. App. 5-6. On that same day, petitioner was informed by Caccitolo that the government could be expected to learn of the agreement's existence. The next day, petitioner for the first time delivered a copy of the agreement to Lydon, and on July 13, 1990, Lydon transmitted the document to the government. *Id.* at 15-16 & n.2.

2. Petitioner was indicted on one count of obstruction of justice, in violation of 18 U.S.C. 1503. The indictment alleged that he had "concealed and intentionally failed to produce . . . in response to the grand juries' subpoenas" the agreement between himself, Caccitolo, and Tokarz. See Pet. App. 6. After the indictment was returned, the government subpoenaed Lydon and informed him of its intention to call him as a witness at petitioner's trial. Petitioner filed a motion in limine, asserting that the

attorney-client privilege barred any questioning of Lydon. The district court denied the motion. Under the crime-fraud exception (see *id.* at 17), the court explained, "[o]n-going misconduct, such as tricking one's attorney into providing false information to a grand jury during an investigation, is not protected by the attorney-client privilege." *Id.* at 26. The court concluded that the government had established a prima facie case of wrongdoing, *id.* at 20-25,[1] and that petitioner's "attempt to explain why this evidence does not indicate that he has waived his attorney-client privilege [is] not sufficient to uphold the attorney-client privilege." *Id.* at 26.

3. The court of appeals affirmed.[2] To invoke the crime-fraud exception, the court held, a party must produce evidence sufficient to establish a prima facie case of the crime or fraud. The court explained the evidentiary showing required to establish a prima facie case (Pet. App. 7 (internal quotation marks omitted)):

> [A] party has established a prima facie case whenever it presents evidence sufficient to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation. * * * [I]f the district court finds such explanation satisfactory the privilege remains.

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[1] The court noted in particular that "[s]ince the unexecuted agreement could fall within the scope of the subpoena, whether [petitioner] wrongfully concealed it from government investigators is a question for the jury to decide." Pet. App. 20.

[2] The court held that it had jurisdiction to review petitioner's interlocutory appeal because the allegedly privileged communications had not yet been disclosed. Pet. App. 3-4 (citing *United States* v. *Calandra*, 706 F.2d 225 (7th Cir. 1983)).

The court concluded that the government had established a prima facie case because the concealed agreement was covered by the "plain language" of the first subpoena served on petitioner, and petitioner did not produce the agreement until after he learned that the government knew of its existence, more than four months after he claimed to have fully complied with the subpoena. Pet. App. 7-8 & n.7, 21. Petitioner "concede[d] that these circumstances require an explanation," but claimed that the agreement was not subject to the subpoena, and that he was not responsible for concealing it. *Id.* at 8. The court acknowledged that petitioner might ultimately prevail at trial but noted that "at this stage of the proceedings, the government need not prove its case. All that is needed is something 'to give color to the charge' that [petitioner] used Lydon as his agent in obstructing the grand jury's investigation." *Ibid.* The court concluded that the government had established a prima facie case that the communications with Lydon served to further petitioner's commission of a crime, and it held that Lydon could be called as a witness at petitioner's trial. *Id.* at 8-10.

ARGUMENT

Petitioner claims that the courts below applied the wrong standard of proof in concluding that the government had established a prima facie case under the crime-fraud exception to the attorney-client privilege. He contends that the courts of appeals are in conflict over that standard, and that "the showing deemed sufficient" by the courts below "would not have satisfied [the] more exacting standards established in other Circuits." Pet. 13. Although there is undoubtedly some disparity between the courts of appeals as to the precise formulation of the applicable standard, in practical effect the decisions are

in accord. Moreover, petitioner would not be entitled to relief under any formulation of the standard. Further review is therefore unwarranted.

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CONCLUSION

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v.

UNITED STATES OF AMERICA,

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PETITIONER'S REPLY BRIEF

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No. 93-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DANIEL M. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

The government concedes that "[t]he courts of appeals have adopted different formulations of the prima facie standard" used to determine whether the attorney-client privilege should be overcome. (Brief of United States at 6) In particular, as the government expressly acknowledges, "[t]he Seventh Circuit . . . has framed the inquiry somewhat differently" from the other Circuits. (*Id.* at 8)

The government maintains that these differences are "semantic," and that all of the formulations are essentially equivalent to the probable cause standard used in the Second Circuit. (Brief of United States at 9) In *United States v. Zolin*, 491 U.S. 554 (1989), however, this Court signaled that the probable cause standard is too low. There the Court held that a showing of probable cause is sufficient to allow a court to conduct *in camera* review of privileged materials to determine if a prima facie showing has been made, but it stated that this is "a lesser evidentiary showing . . . than is required ultimately to overcome the privilege." *Id.* at 572. Indeed, it would make no sense for the two standards to be the same. Yet that is the import of the government's position here. Thus even if the government is correct that most or all of the Circuits follow the "probable cause" standard, that standard is too low under *Zolin*.

The government also maintains that the showing made in the present case would pass muster in any of the Circuits. (Brief of United States at 9-10) We respectfully disagree. The present case involved a claim that a document was subject to subpoena and should have been produced. (As the government correctly notes, *the document was produced by Petitioner* (Brief for United States at 3), but the prosecution contended it should have been produced earlier.) Petitioner argued that the document was not, in fact, within the scope of the subpoena. In holding that the attorney-client privilege had been overcome, the Seventh Circuit noted only that it was "plausible" that the document "could have" fallen within the subpoena's scope. (Pet. App. 9) In short, the court required no proof at all, but merely an allegation. The court's suggestion that the issue was properly one for the jury was, we respectfully suggest, an abdication of its responsibility under *Zolin* and *Clark v. United States*, 289 U.S. 1, 15 (1933) ("it

would be absurd to say that the privilege could be got rid of merely by making a charge of fraud").

None of the other Circuits permit the privilege to be overcome on such sparse proof. In the Eighth Circuit, for example, the "showing" made here would not have been enough; in the case of *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 205-07 (8th Cir. 1985), that court refused to declare the privilege forfeit even though it was shown that counsel had failed to produce documents that were *clearly* subject to a subpoena.

In sum, (1) the "probable cause" standard that the government claims is prevalent is inconsistent with *Zolin*; and (2) this case provides a perfect example of a showing that is, or should be, insufficient under *any* standard.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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